



**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of



DECISION

CWA/164417

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The attached proposed decision of the hearing examiner dated August 26, 2015, is modified as follows and, as such, is hereby adopted as the final order of the Department.

**PRELIMINARY RECITALS**

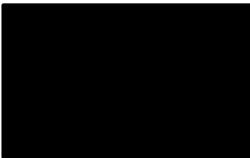
Pursuant to a petition filed March 04, 2015, under Wis. Admin. Code § HA 3.03, to review a decision by the Bureau of Long-Term Support in regard to Medical Assistance, a hearing was held on July 28, 2015, at Neenah, Wisconsin.

The issue for determination is whether the respondent correctly reduced the petitioner's monthly Supportive Home Care hours from 174 hours to 7.5 hours.

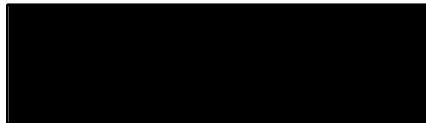
There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:



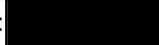
Petitioner's Representative:



Respondent:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, Wisconsin 53703

By:



Bureau of Long-Term Support  
1 West Wilson  
Madison, WI

**ADMINISTRATIVE LAW JUDGE:**

Corinne Balter  
Division of Hearings and Appeals

### FINDINGS OF FACT

1. The petitioner (CARES # [REDACTED]) is a resident of Winnebago County.
2. The petitioner receives long-term care services through the IRIS waiver program.
3. The IRIS waiver program completes annual reviews of the recipients of their services. They completed an annual review for the petitioner.
4. During the annual review IRIS determined that the petitioner's need for Supportive Home Care hours dropped from 174 hours per month to 7.5 hours per month. The reason for this drop was that they believed that much of the petitioner's care could be covered through [REDACTED] offered by the Medicaid State plan. The petitioner is on a ventilator. The petitioner's care related to the ventilator could be covered by [REDACTED]. Under a new IRIS policy, this meant that the petitioner was ineligible for SHC when the services provided during the SHC could be covered through [REDACTED].
5. On December 9, 2014 IRIS completed their Supportive Home Care Hours Assessment Tool. This tool incorporates the IRIS policy, which requires a person to first use [REDACTED] if eligible. The Assessment tool found that the petitioner was eligible for 7.5 hours per month of SHC. 4.25 hours were in the area of housekeeping, and 3.25 hours were in the area of laundry.
6. On February 26, 2015 IRIS sent the petitioner a Notice of Action stating that his SHC hours were decreased from 174 hours per month to 7.5 hours per month.
7. On March 4, 2015 the Division of Hearings and Appeals received the petitioner's request for fair hearing.
8. The petitioner is a 19 year old diagnosed with the following conditions: hypoxic ischemic encephalopathy, seizure disorder, spastic quadriplegia, cerebral palsy, chronic respiratory failure, and chronic airway obstruction. He is tracheostomy dependent. He also has severe neuromuscular scoliosis, developmental delays, has a post gastrostomy tube for feedings, and is dependent on IV fluids as a supplement to his enteral feedings.
9. The petitioner is on a ventilator 24 hours per day. He has significant cares associated with his ventilator dependence.
10. In addition to the SHC hours the petitioner receives through IRIS, the petitioner receives 175 hours per month or 5.75 hours per day of Personal Care Worker (PCW) services through Medicaid Card Services. The listed provider for these services is independence first. The petitioner's mother is the petitioner's PCW.
11. The petitioner's mother also provides the SHC services. The petitioner's doctor believes that his mother has done an outstanding job. The physician does not feel that the petitioner needs private duty nursing. The physician notes that there is skilled nursing supervision or oversight once per week. He believes that this is sufficient.
12. Thus far, the family refuses to be evaluated for PDN services.

### DISCUSSION

The IRIS program was developed pursuant to a Medical Assistance waiver obtained by the State of Wisconsin, pursuant to section 6087 of the Deficit Reduction Act of 2005 (DRA), and section 1915(j) of the Social Security Act. It is a self-directed care program. IRIS policies are found online at <http://www.dhs.wisconsin.gov/publications/P0/P00708.pdf>.

IRIS created a new policy for individuals who are eligible for Private Duty Nursing (PDN). The new policy states:

Wisconsin Medicaid covers private duty nursing (PDN) for participants with medical conditions that require eight or more hours of skilled nursing in a 24-hour period. PDN is defined under Wisconsin Administrative Code § DHS 107.12. PDN includes the skilled nursing services for ventilator-dependent for life support participants, as well as for participants not dependent on a ventilator. Participants with medical conditions requiring less than eight hours of skilled care in a 24-hour period are eligible for skilled nursing from a home health agency through Wisconsin Medicaid as defined under Wisconsin Administrative Code § DHS 107.11 (2a). IRIS Medicaid Waiver Participants qualifying for PDN must maximize the State Medicaid plan benefit prior to using IRIS waiver funds. [] If an IRIS participant is eligible to use this Medicaid State plan benefit, then the participant may not opt to use IRIS funds in lieu of the Medicaid card to pay for unlicensed staff or family to provide this or similar services. *IRIS Policy 6.4*.

This policy section goes on to note that 42 CFR § 440.180 defines Home and Community based services, which are the services provided through the IRIS waiver program as “services, not otherwise furnished under the State’s Medicaid plan, that are furnished under a waiver granted under the provisions of part 441, subpart G of this chapter. *IRIS Policy 6.4*.

A person is eligible for PDN services pursuant to Wis. Admin. Code § DHS 107.12 if the person requires 8 or more hours of skilled nursing services per day. This code section states that PDN services may only be provided when “prescribed by a physician and the prescription calls for a level of care which the nurse is licensed and competent to provide.” *Wis. Admin. Code § DHS 107.12(1)(c)*. The physician shall provide “a written plan of care, including a functional assessment, medication and treatment orders, shall be established for every recipient admitted for care.” *Wis. Admin. Code § DHS 107.12(1)(d)(1)*. The physician's plan of care shall include, in addition to the medication and treatment orders: measurable time-specific goals; methods for delivering needed care, and an indication of which other professional disciplines, if any, are responsible for delivering the care; provision for care coordination by an RN when more than one nurse is necessary to staff the recipient's case; and a description of functional capability, mental status, dietary needs and allergies. *Wis. Admin. Code § DHS 107.12(1)(d)(1)(a-e)*.

A prior authorization is needed for all PDN services. *Wis. Admin. Code § DHS 107.12(2)*. PDN services are not covered if the services are outside of the physician plan of care or if the services are otherwise covered under Wis. Admin. Code § DHS 107.11. Wis. Admin. Code § DHS 107.11 covers skilled nursing services provided in a person’s home under a plan of care as home health services if the services are required for less than 8 hours per day. This code section also covers home health aide services. A prior authorization request is also needed for services under Wis. Admin. Code § DHS 107.11.

In this case the petitioner is a severely disabled 19-year-old who requires a very high level of care. He is a quadriplegic who has a tracheotomy, is tube fed, and is ventilator dependent. Thus far, his mother has been providing his care. His physician is comfortable with the petitioner’s mother continuing to provide his care. The petitioner’s mother is currently paid for just over 11.5 hours per day to provide her son’s care. I note that 5.75 of those hours are covered through Medicaid card service. She would like to continue to provide her son’s care, and continue to get paid for providing this care.

The issue arises in this case because IRIS created a new policy, which states that they cannot pay for SHC hours for time in which a person would be eligible for PDN services under the Wisconsin Medicaid card service. This is in accordance with the federal regulations, which states that IRIS is only to provide services not otherwise furnished under the State’s Medicaid plan. See 42 CFR § 440.180.

After the implementation of this policy, IRIS completed an annual review of the petitioner. During this review process healthcare professionals evaluated the petitioner. These healthcare professionals

concluded that the petitioner would be eligible for PDN services because he is ventilator dependent 24 hours per day. To date the petitioner has not been evaluated to determine whether or not he would be eligible for [REDACTED] services. In addition, no prior authorization has been submitted for [REDACTED] or other skilled nursing hours under Wis. Admin. Code § DHS 107.11 or 107.12. This delay is due in part to the family's unwillingness to cooperate with this process as it is the mother's wish to continue to be paid by IRIS to provide care to her son.

I conclude that this petitioner may be functionally eligible for several MA state plan services, including Home Health skilled nursing services, Wis. Admin. Code § DHS 107.11, Respiratory care for ventilator-assisted recipients, Wis. Admin. Code § DHS 107.113 or [REDACTED] Wis. Admin. Code § DHS 107.12. No prior authorization for any of these services has been completed, so his actual eligibility is still only speculative. The program believes that the petitioner would benefit from [REDACTED] services, but the petitioner has elected not to accept or receive those services. The IRIS MA-waiver program provides medically necessary services and supports to recipients, but only when the recipient agrees, either personally or through a legal representative, to accept those services as part of the individual's service and support plan.

The petitioner's attending physician has said that the care provided by the petitioner's mother is sufficient to meet the petitioner's care needs, and that [REDACTED] services are not necessary; *see*, Finding of Fact #11. [REDACTED] services require prior authorization, which requires a physician's request, or prescription, for the service. The petitioner may in fact be functionally eligible for [REDACTED] services, but it seems clear, at least at this time, that no request for prior authorization is forthcoming. Therefore, [REDACTED] services are not authorized for the petitioner, and the IRIS program may not base its assessment of his need for SHC hours as if the petitioner actually received [REDACTED] services, even if this is due to the family's unwillingness to cooperate rather than the petitioner being found ineligible for these services were the proper steps followed. However, the petitioner may not then receive SHC service hours through the IRIS program to replace or supplant the declined state plan skilled care services. By declining to even be assessed for the [REDACTED] service, the petitioner has, in effect, decided to obtain these services through natural supports or other sources.

It should be noted that the cost of providing services would be significantly higher as private duty nursing services when compared to the amount that the MA program currently pays the petitioner's mother for providing care to the petitioner. Although cost is an appropriate consideration when developing an individualized service and support plan, the relative cost of the services is secondary where the federal regulations require utilization of state plan services before waiver services may be authorized.

I understand the petitioner's mother's desire to continue to provide her son services. However, the federal regulations do not allow the IRIS program to pay her for providing home and community based waiver services if those services can be covered through a state plan, Medicaid card service; *see*, 42 C.F.R. § 440.180. Home and community based waiver services, such as supportive home care services, may not replace or supplant otherwise available and appropriate state plan services, such as [REDACTED] or home health services. Although the doctor is comfortable with the mother continuing to provide the services, and would ultimately be responsible under his professional license for ensuring proper care is prescribed, the issue is not whether the mother is capable, but rather whether the mother can be paid by the IRIS program for providing those services. The medical assistance waiver programs are intended to provide necessary supports and services to program beneficiaries, not jobs for the beneficiary's family. Ultimately, the mother's desire to continue to be paid for providing services to her son is not relevant to the final decision herein. There is no question that the mother could continue to provide the services without payment, as deemed appropriate by the petitioner's doctor.

The petitioner is a quadriplegic who has a tracheotomy, is tube fed, and is ventilator dependent. Much of the care that the mother is providing would be considered skilled nursing services under the

administrative code. The mother has always provided this care, and appears to be capable of providing the care, likely because this is her son, and she has always done it. However, some of the duties that IRIS was paying the petitioner's mother to perform through SHC services are skilled nursing tasks. The IRIS program cannot pay the petitioner's mother for providing skilled nursing services, principally because she is not a registered or licensed nurse but also because skilled nursing services provided by a parent to her child under the age of 21 is not an MA covered service; *see*, Wis. Admin. Code §§ DHS 105.19(1) & DHS 107.12(4)(c).

Skilled nursing services are obviously not the same as supportive home care services. However, some secondary care directly related to the skilled nursing service is essentially supportive home care, such as linen changing following a skilled nursing service. These services are incidental to the skilled care and are deemed included in the skilled nursing service<sup>1</sup>. As incidental to the skilled care, they are not separately reimbursable as SHC under the authorization for the [REDACTED] or skilled nursing service. The federal rules do not allow the IRIS program to pay for home and community based waiver services when state plan services are available to provide the appropriate care. The IRIS policy requires, in accordance with federal law, that enrollees utilize state plan services, such as [REDACTED] before waiver services, such as SHC, become available. Therefore, to the extent that the petitioner's mother provides SHC integral to what would be skilled nursing care, those services would be non-reimbursable as secondary to the declined [REDACTED] service.

It is speculative as to the amount of time that may have been spent to provide these non-reimbursable services. The IRIS program previously authorized 174 hours of SHC services per month for the petitioner. The program reduced the number of authorized hours of SHC service, but it is not clear that it reduced the hours only for care that would be considered skilled care or as integral to or directly related to the skilled care. It is undeniable that the petitioner has significant skilled care needs, but he also requires some amount of supportive home care as well.

This matter needs to be remanded to the program to determine the appropriate number of hours of SHC to be authorized for the petitioner. The program may not determine the SHC hours through its assessment tool as if the petitioner receives [REDACTED] services; those services have clearly been declined for now. The petitioner could elect to be assessed for [REDACTED] or skilled nursing care. If it is determined that he is not actually eligible for these services, then it would appear likely that the previous authorization for SHC hours was an appropriate one. However, the petitioner may not substitute waiver services to compensate for appropriate but declined state plan services. To the extent that the previously authorized SHC service time was spent on care or services that were either essentially skilled care or an integral part of the provision of a skilled care service, those services are not separately reimbursable and the SHC authorized hours may be reduced accordingly. I assume, without deciding, that the resulting number of SHC hours authorized may be somewhat less than the previously authorized 174 hours per month, but would very likely be more than the 7.5 hours per month for housekeeping and laundry that the IRIS program reduced the petitioner's authorization to.

### **CONCLUSIONS OF LAW**

The petitioner may decline to accept a healthcare service that the petitioner does not desire, including state plan Medicaid card services. However, the petitioner is not then entitled to obtain waiver services to

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<sup>1</sup> Many PDN providers are nurses in independent practice; Wis. Admin Code § DHS 105.19(1). A nurse in independent practice is expected to complete these secondary care tasks, and the assistance of an aide is not otherwise reimbursable; Wis. Admin. Code § DHS 107.12(4)(b). When skilled nursing care is provided as a component of the home health services state plan benefit, such secondary care may be delegated by the RN to a home health aide. Reimbursement for these secondary tasks are inclusive of the reimbursement rate paid for the home health service; Wis. Admin. Code § DHS 107.11(2)(b)3. There is no additional reimbursement for these secondary tasks performed by an aide.

compensate for the declined state plan service. The IRIS program may not authorize or pay for home and community based waiver services that are intended to substitute for Medicaid state plan services.

**THEREFORE, it is**

**ORDERED**

That this matter be and hereby is REMANDED to IRIS to determine an appropriate authorization of hours of supportive home care for the petitioner.

**REQUEST FOR A REHEARING**

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST". Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

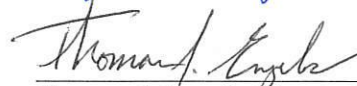
The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

**APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI, 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of  
Madison, Wisconsin, this 27 day  
of January, 2016.



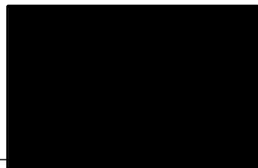
Thomas J. Engels, Deputy Secretary  
Department of Health Services



FH  
[REDACTED]

**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

In the Matter of



PROPOSED DECISION

CWA/164417

**PRELIMINARY RECITALS**

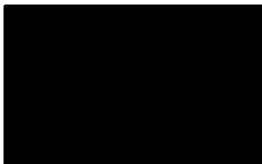
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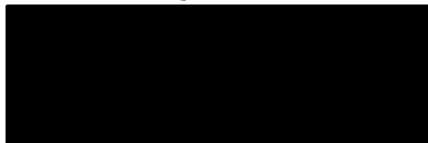
There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:



Petitioner's Representative:



Respondent:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, Wisconsin 53703

By:

[REDACTED]  
Bureau of Long-Term Support  
1 West Wilson  
Madison, WI

**ADMINISTRATIVE LAW JUDGE:**

Corinne Balter  
Division of Hearings and Appeals

**FINDINGS OF FACT**

1. The petitioner (CARES # [REDACTED]) is a resident of Winnebago County.
2. The petitioner receives long-term care services through the IRIS waiver program.

3. The IRIS waiver program completes annual reviews of the recipients of their services. They completed an annual review for the petitioner.
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5. On December 9, 2014 IRIS completed their Supportive Home Care Hours Assessment Tool. This tool incorporates the IRIS policy, which requires a person to first use [REDACTED] services, if eligible. The Assessment tool found that the petitioner was eligible for 7.5 hours per month of SHC. 4.25 hours were in the area of housekeeping, and 3.25 hours were in the area of laundry.
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10. In addition to the SHC hours the petitioner receives through IRIS, the petitioner receives 175 hours per month or 5.75 hours per day of Personal Care Worker (PCW) services through Medicaid Card Services. The listed provider for these services is independence first. The petitioner's mother is the petitioner's PCW.
11. The petitioner's mother also provides the SHC services. The petitioner's doctor believes that his mother has done an outstanding job. The physician does not feel that the petitioner needs private duty nursing. The physician notes that there is skilled nursing supervision or oversight once per week. He believes that this is sufficient.
12. Thus far, the family refuses to be evaluated for PDN services.

### DISCUSSION

The IRIS program was developed pursuant to a Medical Assistance waiver obtained by the State of Wisconsin, pursuant to section 6087 of the Deficit Reduction Act of 2005 (DRA), and section 1915(j) of the Social Security Act. It is a self-directed personal care program. IRIS policies are found online at <http://www.dhs.wisconsin.gov/publications/P0/P00708.pdf>.

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ventilator. Participants with medical conditions requiring less than eight hours of skilled care in a 24-hour period are eligible for skilled nursing from a home health agency through Wisconsin Medicaid as defined under Wisconsin Administrative Code § DHS 107.11 (2a). IRIS Medicaid Waiver Participants qualifying for PDN must maximize the State Medicaid plan benefit prior to using IRIS waiver funds. [] If an IRIS participant is eligible to use this Medicaid State plan benefit, then the participant may not opt to use IRIS funds in lieu of the Medicaid card to pay for unlicensed staff or family to provide this or similar services. *IRIS Policy 6.4*.

This policy section goes on to note that 42 CFR § 440.180 defines Home and Community based services, which are the services provided through the IRIS waiver program as “services, not otherwise furnished under the State’s Medicaid plan, that are furnished under a waiver granted under the provisions of part 441, subpart G of this chapter. *IRIS Policy 6.4*.

A person is eligible for [REDACTED] services pursuant to Wis. Admin. Code § DHS 107.12 if the person requires 8 or more hours of skilled nursing services per day. This code section states that [REDACTED] services may only be provided when “prescribed by a physician and the prescription calls for a level of care which the nurse is licensed and competent to provide.” *Wis. Admin. Code § DHS 107.12(1)(c)*. The physician shall provide “a written plan of care, including a functional assessment, medication and treatment orders, shall be established for every recipient admitted for care.” *Wis. Admin. Code § DHS 107.12(1)(d)(1)*. The physician's plan of care shall include, in addition to the medication and treatment orders: measurable time-specific goals; methods for delivering needed care, and an indication of which other professional disciplines, if any, are responsible for delivering the care; provision for care coordination by an RN when more than one nurse is necessary to staff the recipient's case; and a description of functional capability, mental status, dietary needs and allergies. *Wis. Admin. Code § DHS 107.12(1)(d)(1)(a-e)*.

A prior authorization is needed for all [REDACTED] services. *Wis. Admin. Code § DHS 107.12(2)*. [REDACTED] services are not covered if the services are outside of the physician plan of care or if the services are otherwise covered under Wis. Admin. Code § DHS 107.11. Wis. Admin. Code § DHS 107.11 covers skilled nursing services provided in a person’s home under a plan of care if the services are required for less than 8 hours per day. This code section also covers home health aide services. A prior authorization request is also needed for services under Wis. Admin. Code § DHS 107.11.

In this case the petitioner is a severely disabled 19-year-old who requires a very high level of care. He is a quadriplegic who has a tracheotomy, is tube fed, and is ventilator dependent. Thus far, his mother has been providing his care. His physician is comfortable with the petitioner’s mother continuing to provide his care. The petitioner’s mother is currently paid for just over 11.5 hours per day to provide her son’s care. I note that 5.75 of those hours are covered through Medicaid card service. She would like to continue to provide her son’s care, and continue to get paid for providing this care.

The issue arises in this case because IRIS created a new policy, which states that they cannot pay for SHC hours for time in which a person would be eligible for [REDACTED] services under the Wisconsin Medicaid card service. This is in accordance with the federal regulations, which states that IRIS is only to provide services not otherwise furnished under the State’s Medicaid plan. See 42 CFR § 440.180.

After the implementation of this policy, IRIS completed an annual review of the petitioner. During this review process healthcare professionals evaluated the petitioner. These healthcare professionals concluded that the petitioner would be eligible for [REDACTED] services because he is ventilator dependent 24 hours per day. To date the petitioner has not been evaluated to determine whether or not he would be eligible for [REDACTED] services. In addition, no prior authorization has been submitted for [REDACTED] or other skilled nursing hours under Wis. Admin. Code § DHS 107.11 or 107.12. This delay is due in part to the family’s unwillingness to cooperate with this process as it is the mother’s wish to continue to be paid by IRIS to provide care to her son.

I conclude that this petitioner is eligible for [REDACTED] services. Although no plan of care has been established and no prior authorization submitted, this is due to the family's unwillingness to cooperate rather than the petitioner being ineligible for these services were the proper steps followed.

I understand the petitioner's mother's desire to continue to provide her son services. However, the federal regulations do not allow the IRIS program to continue to pay her for her services if those services can be covered through [REDACTED]. Although the doctor is comfortable with the mother continuing to provide the services, the issue is not whether the mother is capable, but rather whether the mother can be paid by the IRIS program for providing those services. There is no question that the mother could continue to provide the services without payment.

The issue is whether the petitioner is eligible for [REDACTED]. The petitioner is a quadriplegic who has a tracheotomy, is tube fed, and is ventilator dependent. Much of the care that the mother is providing would be considered skilled nursing services under the administrative code. The mother has always provided this care, and appears to be capable of providing the care, likely because this is her son, and she has always done it. However, much of the duties that IRIS was paying the petitioner's mother to perform through SHC services are skilled nursing tasks. Thus, under this IRIS policy these are no longer covered services.

### **CONCLUSIONS OF LAW**

The IRIS program correctly reduced the petitioner's SHC hours from monthly Supportive Home Care hours from 174 hours to 7.5 hours.

**THEREFORE, it is**

**ORDERED**

If this Proposed Decision is adopted by the Secretary, then this case is dismissed.

### **NOTICE TO RECIPIENTS OF THIS DECISION:**

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH.

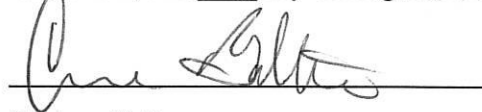
If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as "PARTIES IN INTEREST."

...

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Health Services for final decision-making.

The process relating to Proposed Decision is described in Wis. Stat. § 227.46(2).

Given under my hand at the City of Milwaukee,  
Wisconsin, this 26 day of August, 2015

A handwritten signature in cursive script, appearing to read "Corinne Balter", written over a horizontal line.

Corinne Balter  
Administrative Law Judge  
Division of Hearings and Appeals